IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 004 of 2017
[High Court Lautoka Criminal Case No. HAC 21of 2013]

BETWEEN	**:**	**MOHAMMED ZAHID KHAN**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**29 May 2020**
Date of Ruling	**:**	**03 June 2020**

RULING

[1] The appellant had been charged in the High Court of Lautoka on a single count of rape contrary to section 207(1) and (2)(a) of the Crimes Decree No.44 of 2009. The particulars of the offence were that;

> *'BA, on the 26th day of January 2013, in the Western Division had penetrated the vagina of AB with his penis without her consent'*

[2] After full trial, the three assessors had expressed a unanimous opinion of guilty against the appellant on 21 November 2016. The learned High Court judge in the judgment dated 22 November 2016 had agreed with the assessors and convicted the appellant of the count of rape. He was sentenced on 25 November 2016 to imprisonment of 10 years with a non-parole period of 07 years.

[3] The appellant by himself had signed a timely notice of appeal on 29 November 2016 against conviction and sentence. His lawyers had tendered amended grounds of appeal only against conviction along with an application for bail pending appeal on 10 May 2018. Once again his attorneys had tendered another amended notice of appeal and written submissions only against conviction on 09 July 2018. The State had tendered its written submissions on 26 February 2020.

[4] The appellant has not yet tendered to court Form 3 under Court of Appeal Rule 39 seeking to abandon his appeal against sentence.

[5] The evidence against the appellant and his defense at the trial according to the judgment are as follows.

> *'19. The prosecution alleges that the accused forcefully had a sexual intercourse with the victim on the 26th of January 2013. The accused is the step father of the victim. She was asked by the accused to come and press his back in the early morning of the 26th of January 2013. Her mother and other siblings had gone to the flea market and she was alone with the accused at home. While she was going out of the room after pressing his back, he had stopped her and started to kiss her. He then has dragged her to the bed and had sexual intercourse with her without her consent.'*
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> *19. The defence denies the allegation and claims to be false. The accused stated that the victim together with her boyfriend conspired and made this false allegation as he always disapproved their relationship.*
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> *22. The accused completely denied this incident as a false fabrication. However, he does not dispute that he was at the house with the victim in the morning of 26th of January 2013. He further said that he asked her to come and press his back….'*

[6] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The threshold test applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be granted (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA

144; AAU83.2015 (12 July 2019). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

Law on bail pending appeal

[7] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

*'[5] There is also before the Court an application for **bail pending appeal** pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant **bail pending appeal** may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

*[6] In **Zhong –v- The State** (AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*

> *"[25] Whether **bail pending appeal** should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to **bail pending appeal**. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*
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> *[26] The starting point in considering an application for **bail pending appeal** is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*
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> *[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:*
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> > *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*

(a) the likelihood of success in the appeal;

(b) the likely time before the appeal hearing;

(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."

[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that ***bail pending appeal*** *should only be granted where there are exceptional circumstances. In* ***Apisai Vuniyayawa Tora and Others –v- R*** *(1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of ***bail pending appeal****. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

[30] This second aspect of exceptional circumstances was discussed by Ward P in ***Ratu Jope Seniloli and Others –v- The State*** *(unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

"The likelihood of success has always been a factor the court has considered in applications for ***bail pending appeal*** *and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and* ***the courts in Fiji have long required a very high likelihood of success****. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for* ***bail pending appeal*** *to delve into the actual merits of the appeal. That as was pointed out in Koya's case (****Koya v The State*** *unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

[31] It follows that the long standing requirement that ***bail pending appeal*** *will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[8] In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004***)*** the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* are directly relevant *' only if the Court accepts there is a real likelihood of success'* otherwise, those latter matters *'are otiose'* (See also **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019)

[9] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[10] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

> *'It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).*
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> *On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'*

[11] In ***Balaggan*** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

[12] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."*

[13] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[30].....All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for* ***bail pending appeal*** *should attempt even to comment on. They are matters for the Full Court ... . "*

[14] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *'"The general restriction on granting* ***bail pending appeal*** *as established by cases by Fiji _ _ _ is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."*

[15] Therefore, the legal position appears to be that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[16] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result.

[17] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them, then he cannot obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances

to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[18] **Grounds of appeal**

'1. ***THAT*** *the complainant of the first prosecution witness was adduced through skype though there was no proper hearing calling on an expert to give a report on whether or not the manner of her giving evidence was going affect the content of her evidence if she faced the appellant.*

2. ***THAT*** *the complainant did not fit into the category of vulnerable witness as she was an adult and that the Learned Trial Judge by granting the exemption from her facing the Appellant was a miscarriage of justice.*

3. ***THAT*** *the Learned Trial Judge erred in law and in fact when he failed to direct himself and/or direct the assessors on certain facts which would have pointed to the credibility of the Appellant.*

4. ***THAT*** *in paragraph 9 & 10 of the judgment, the Learned Judge in stating that the medical report has no significant findings was wrong as the doctor was the first independent person that the complainant came into contact with who noted the inconsistency of the history given by the victim and the findings of the clinical examination.*

5. ***THAT*** *the court could have directed on the failure of the prosecution to call the uncle and the mother of the complainant who also turned up at the place of the alleged incident for they would have been the ones to attest to the demeanour of the victim after the incident as they were the first to see the complainant after the appellant is said to have occurred.'*

01st and 02nd grounds of appeal

[19] Under these two grounds of appeal the appellant complains that taking of the evidence of complainant *via* skype had been done without a proper hearing and she was not a vulnerable witness but an adult and therefore the exemption granted to the witness in facing the appellant had resulted in a miscarriage of justice.

[20] Without having the full appeal record I cannot understand the circumstances under which the learned trial judge had decided to take the complainant's evidence *via* skype as permitted by section 295 and 131(2) of the Criminal Procedure Act, 2009. Both sections must be read together. In terms of section 131(1) the rule is that all evidence shall be taken in the presence of the accused unless issues of safety or the interest of

justice requires the taking of evidence otherwise as permitted under section 131(2). At the same time section 295 requires the judge or the magistrate to comply with the procedure laid down in the subsections of section 295 before allowing taking of evidence of a vulnerable complainant or a witness in any other mode other than in a face to face arrangement in the court house with the accused. The procedure requires an application on the part of the prosecution which should be determined by the trial judge or the magistrate in chambers after hearing both parties and calling for reports (if the judge considers it necessary to do so) on the effect of such witness giving evidence in person in the ordinary way or in any other mode. In determining the application the trial judge should have regard to minimising the stress on such vulnerable complainant or witness and also ensuring a fair trial for the accused.

[21] In **Lotawa v State** [2014] FJCA 186; AAU0091.2011 (5 December 2014) the Court Appeal dealt with the operation of section 295 in detail and stated as follows.

> *'[6]…….. Skype is a relatively new medium used extensively in social media and for personal contact between parties in place of telephones. It is noted that it has been used in Courts for the taking of evidence in Canada, Sri Lanka, Australia and in Fiji and as such it has been a very useful medium for the admission of evidence in 2 obvious circumstances. First, for the protection of a "vulnerable" witness, provided for in sections 295 and 296 of the Criminal Procedure Decree 2009 and secondly for the good administration of justice, to hear a witness from abroad pursuant to section 131(2) of that Decree. Evidence by "skype" although convenient and immediate, suffers of course from the vagaries of any other electronic medium in that it can crash, perform erratically or be deceptive as to colour, sound and light. The quality of its transmission will depend on the quality of the equipment being used at each station and in particular the cameras both at transmission and reception. It is impossible when receiving evidence by "skype" to properly observe the demeanour and reactions of a witness: in a case heavily dependent on credibility, the witness' words are often no match for his or her reaction to questions or for his or her display of sincerity or insincerity in giving evidence. It is therefore a much inferior method of receiving evidence, inferior to live viva voce evidence and for these reasons alone, although allowed by s.131(2) and section 295, it should be used only rarely for vulnerable witnesses and hardly ever for convenience reasons. In any event as Gamalath JA says care must be taken by the presiding Judge to comply with the procedure set out in s.295 and **state** judicially why he is allowing evidence to be adduced by that medium.'*

> *'[36] In my opinion, since this entails a special procedure relating to admission of evidence of vulnerable witnesses/complainants, at its conclusion the Judge/Magistrate should adduce reasons in writing to explain how he arrived at a decision. This in my view is a mandatory requirement.'*
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> *'[37] As can be understood, Section 295 of the Criminal Procedure Decree, 2009 sets out a mandatory procedure to follow by a Court, before a decision is made under Section 296 of the Criminal Procedure Decree 2009.'*
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> *'[38] The pre-requisite that should be satisfied under Section 295 should be carefully followed by a Court before moving into act under Section 296 of the Criminal Procedure Decree 2009.'*

[22] Considering the fact that the learned trial judge had stated in the summing-up that initially the complainant had been reluctant and refused to give evidence twice and had agreed to give evidence after several adjournments, possibly after the court allowed her evidence to be taken *via* skype, I think it is important to find out whether the relevant provisions in the Criminal Procedure Act had been duly followed. This is more so given the accused's defence that the allegation of rape was a fabrication on the part of the complainant and her boyfriend who had been assaulted by the appellant about 05 months before the allegation of rape, when he found him hiding under her bed in August 2012. There had been also an abortion carried out on the complainant in January 2012 after being admittedly impregnated by the boyfriend who had admittedly never liked the appellant and refused to marry the complainant despite requests from the appellant. The question naturally arises as to why the complainant was so reluctant to face the appellant in court and substantiate the allegation of rape in his presence. If the reluctance was due to the allegation being not genuine the skype evidence may have affected the interest of justice and the appellant's right to have a fair trial.

[23] On the other hand, going by the summing-up and the judgment, the counsel for the appellant does not seem to have objected to the procedure adopted to take the complainant's evidence *via* skype. If that was not in issue at all at the trial stage, the appellant may be only taking it up now just as a point of appeal. If that be the case, even if the relevant provisions in the Criminal Procedure Act had not been strictly followed the failure may not have caused a miscarriage of justice or a substantial miscarriage of justice.

[24] None of these issues could be looked into without the full appeal record and therefore, at this stage these grounds of appeal cannot be said to have a reasonable prospect of success. Therefore, they do not have a very high likelihood of success either.

03rd and 04th grounds of appeal

[25] The appellant argues under these grounds of appeal that the learned trial judge had not properly directed the assessors on the medical history of the complainant, the inconsistency between the history given by the complainant and the findings of the clinical examination and the animosity between the complainant and the appellant.

[26] It appears that the learned trial judge had not addressed the assessors on the medical evidence in the form of the medical report tendered as an agreed fact without calling the doctor in the summing-up. However, I find that in paragraph 7 of the summing-up the judge had asked the assessors to reach their opinion on evidence from the witness box, agreed facts, documents and exhibits and in paragraphs 9, 10 and 11 of the judgment the trial judge had dealt with the medical report in detail including the alleged inconsistency between the history given by the complainant and the findings of the clinical examination.

[27] It is clear that the appellant's counsel had decided as a trial strategy to accept the medical report as an agreed fact and therefore the prosecution was not required to call the doctor to give evidence. Had the appellant wanted to elicit more from the doctor who had examined the complainant after the alleged act of rape, he could have easily called him or refrained from agreeing to treat the medical report as an agreed fact. Had the doctor been summoned he could have explained why there could be no signs of vaginal trauma in this instance. In the absence of such evidence the reason adduced by the trial judge in paragraph 11 of the judgment in explaining why there may not have been physical signs of any act of sexual penetration cannot be criticised. His statement in paragraph 9 of the judgment that the medical report does not reveal any significant findings and his further analysis why there were no injuries on her body or in genitalia given the complaint's evidence that she did not offer physical resistance to the act of penetration has to be looked at in this context. It should also be borne in mind that the

complainant had admittedly had sexual intercourse before with her boyfriend and undergone an abortion.

[28] In any event, this court at this stage does not have the benefit of reading the medical report and the evidence of the complainant. In the circumstances, the omission to specifically address the assessors on the medical report which had stated that the findings of the clinical examination are not consistent with the history given by the complainant cannot be said to have resulted in a miscarriage of justice.

[29] I also find that contrary to the appellant's assertion, the trial judge in paragraphs 19, 50-53 and 64-66 of the summing-up had addressed the assessors on his version of events. In addition the trial judge had dealt with the animosity between the complainant and her boyfriend on the one hand and the appellant on the other in paragraph 5 of the judgment.

[30] Therefore, the appellant's grievance under these grounds of appeal does not reach the threshold of reasonable prospect of success and the very high likelihood of success.

05th ground of appeal

[31] The appellant argues that the court should have directed the prosecution to call the complainant's mother and the uncle. Exercising the prosecutorial discretion the State had decided to call only her boyfriend to whom the complainant had made a complaint immediately after the alleged incident of rape but not the mother who had arrived at the house even before the boyfriend arrived.

[32] There is nothing to indicate that the counsel for the appellant had made an issue of this at the trial stage. Nor had he sought any redirections on this matter. The appellant is liable to be barred from even raising this point of appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].This ground has no merit.

[33] Therefore, none of the grounds of appeal has a reasonable prospect of success to be given leave to appeal at this stage. Nor do they have a very high likelihood of success to consider bail pending appeal.

[34] The appellant has not submitted any other exceptional circumstances for this Court to consider in respect of his bail pending appeal application favourably.

[35] Accordingly, bail pending appeal and leave to appeal against conviction is refused.

Orders

1. Leave to appeal against conviction is refused.
2. Bail pending appeal is refused.

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL